No. 3953

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WASHINGTON BRICK LIME & SEWER COMPANY, a corporation,
Appellant,

vs.

McCLINTIC-MARSHALL CO., *et al,*
Appellees.

BRIEF OF RECEIVER

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This appellant corporation made a contract with the Scandinavian American Building Company on February 28, 1920, whereby it agreed to furnish the terra cotta to be used in the building then being built by the building company on Lots 10, 11 and 12 in Block 1003 Map of New Tacoma in Pierce County, Washington. This Contract among other things contained the following clause: "should the contractor be delayed in delivering his material, by the owner, certificates are to be given for payment for material completed in the factory". The

contract further provided that the whole purchase price of the terra cotta should be $109,000.00; that the delivery of the material should commence within 4 months from date and be completed within 6 months from date; payment should be made for the material monthly, 75% in cash of the estimated value of the material delivered and the balance of 25% from 30 to 60 days after the completion of the contract. (Tr. p. 584 et seq.) The contract itself did not provide where the material was to be delivered but the appellant had made a written proposal dated February 19, 1920, to furnish this terra cotta, which contained the following clauses: "we agree to give you, free of charge, the services of an experienced terra cotta setter and fitter".

"This price of $109,000.00 is for delivery at the building site."

The plant of the appellant is located at Clayton near Spokane, Washington, and the appellant had about 400 feet of storage space at its plant.

Its president and the superintendent of its terra cotta department came to Tacoma on August 10, 1920, bringing with them a statement, prepared in accordance with the contract, and showing that the appellant had ready at the factory terra cotta of the estimated value of $29,500., which statement contained the following clause: "as per terms of contract in Article V. 75% of $29,500.00 * * * $22,-125.00" (Tr. p. 823), and in accordance with that

statement the appellant was paid $20,000.00 by the building company, so that it is apparent that the terra cotta which was thereafter shipped from the appellant to Tacoma was the terra cotta covered by this statement.

Thereafter and in September the appellant began to ship terra cotta to Tacoma. The appellant got in touch with a Mr. Kellogg, who in turn brought it in touch with a Mr. Fritch of a Tacoma concern known as "The Local & Long Distance Transfer & Storage Company" who suggested that the material shipped by the appellant to Tacoma might be stored in the Great Northern Freight sheds, and arrangements were made by the appellant with the Great Northern giving the appellant the right to store its material on some lands belonging to the Great Northern and adjoining its freight sheds. (Tr. p. 827-828.)

As to the reason why this was shipped to Tacoma, if that is material in this case, although the appellant's officers testified that it was done for the convenience of Mr. Wells who was the superintendent of the building under the architects, we submit that the testimony of the appellant leaves a great deal of room for doubt on that subject. For instance, Mr. Bryan at one place in his testimony states "I discussed with him (Wells) myself personally on the matter of delivery of the material in Tacoma *and obtained their permission to do so.*" (Tr. p. 797.) And again he said "We

started it before Mr. Wells,—in other words we took it from the piles. Our first shipment was taken from the piles prematurally, we moved it to save reloading and to save restoring, shipped it to Tacoma." (Tr. p. 799-800.) Again he said "we had no place to store it" referring to the unfinished product in their yard. (Tr. p. 804.)

Mr. Fosseen, the president of the appellant stated: "Mr. Wells spoke to me about the terra cotta shipped to this point saying it would cost no more to ship it over here and unload it than it would to keep it in Spokane". (Tr. p. 810.) And again "getting the material over here would be just a question of service. It was in our way there and cost us money to come over here;" and again, "we have to have a certain amount of fitting and this was blocking the yard and we didn't have enough room in the yard or in the fitting shed or storage shed, so I put it outside with a temporary roof over it and we were ready and anxious to make delivery," referring to some material which the appellant had ready for delivery in November. (Tr. p. 816.)

So that even from the verbal testimony of the appellant's officers it is somewhat doubtful that the appellant shipped this material to Tacoma, as the appellant's brief might lead the court to believe, merely for the purpose of acommodating the building company. This theory is also at variance with all of the correspondence between

the parties during that period of time. In November the appellant wrote a letter to the building company in which it stated that it was enclosing another statement of the terra cotta manufactured and ready for shipment at its plant and demanding, in accordance with the terms of that statement $12,000.00 under the contract, which letter contains the following clause: "we are ready to make shipment of 211½ tons and until we get payment for same or until you are ready to receive it at the building we will not ship same—until either one of these propositions are completed".

"However, if you do pay the $12,080.50 we will do as we have been doing—shipping the terra cotta and have it go to Tacoma and be ready for you. You can see that this is not in our contract to rent ground space and unload and reload again but we do that so as to make certain that the car shortage would not delay the delivery of the terra cotta." (Tr. p. 813.)

This letter was dated November 5th and was in answer to a letter of November 4th written by the superintendent of the building company urging shipment, in which Wells said to them "When will you be ready to cornice at the first office floor? So far the material you have shipped does not give us enough to start at any particular point." (Tr. p. 802.)

A representative of the appellant called on Mr.

Drury and Mr. Larson at the office of the building company at the time that this demand for $12,-000.00 was made and at that time the building company refused to pay this $12,000.00 on the ground that the terra cotta as shipped to Tacoma was so incomplete that it could not be used to advantage. (Tr. p. 826.) They received the assurance of the officers of the company that as soon as the terra cotta was complete that the building company would pay for it when it arrived in Tacoma.

This terra cotta which was shipped to Tacoma was not consigned to the building company. "That material that was shipped to Tacoma was consigned to the Local & Long Distance Transfer Company, a Tacoma concern. They took care of the material for the Washington Brick Company, transferring it to the storage yards. We employed them and paid that expense and I think our company paid the rent on the storage yard." (Tr. p. 802.)

On January 15, 1921, when the Scandinavian American Bank of Tacoma failed, the appellant had shipped to Tacoma and was holding in Tacoma approximately one-half of the terra cotta which it had contracted to furnish. This was of the approximate value of $58,000.00. Approximately one-fifth of this material was on hand at the plant of the appellant and ready for shipment—the balance was in various stages of manufacture. At that time, this terra cotta on hand at the factory was loaded on

cars at the plant of the appellant for shipment to Tacoma, and upon being notified that the bank had failed, the officers of the appellant immediately caused this to be unloaded.

The appellant thereafter filed its lien against the property of the building company on February 24, 1921, in which it set forth that there was due to it $89,000.00, and claiming a lien upon the property for $89,000.00. (Tr. p. 865.) Thereafter the receiver was appointed by the court. Thereafter negotiations were entered into between the receiver and the appellant with a view to seeing what could be done toward getting the terra cotta and putting it on the building for the protection of the steel, which negotiations culminated in August, 1921, by the refusal on the part of the appellant to take either position, that the terra cotta belonged to it and did not belong to the receiver of the building company, or that the terra cotta belonged to the receiver of the building company and did not belong to it. The court will find a letter written to the appellant by the attorneys for the receiver demanding that they elect whether they would deliver the material for which they claimed their lien to the receiver without any restriction or dismiss their lien claim and retain possession of the terra cotta. (Ex-142, Tr. p. 817.) This letter was received by the appellant but they refused to elect, merely taking the position that the matter was in litigation and up to the court for decision.

ARGUMENT

As will be noted from the statement of facts which we have made there are two questions presented; first, whether or not the appellant is entitled to foreclose its lien by reason of the tremendously inflated lien which it filed. Secondly, whether or not under the circumstances of the case any terra cotta was furnished to the Building Company within the meaning of the lien statute.

With reference to the first question: The appellant proved on the trial the value of the material in its yards in Spokane which had been completely finished and also the value of the terra cotta partially manufactured but not finished. The appellant, however, does not now claim a lien for any cotta, except that which it had shipped to Tacoma. In view of the admitted fact that it was the duty of the appellant to ship this material to Tacoma, paying the freight thereon, and then to deliver it to the building company, paying the drayage thereon, it is apparent that the appellant could not possibly have any lien for the material which was unmanufactured or for the material which was manufactured but not shipped from Spokane. The court will notice that a portion of this terra cotta was all ready for shipment at the time that the appellant learned that the bank had failed and the appellant thereupon caused these cars to be unloaded. This is significant in that it shows that the terra cotta had never passed from under the

dominion and control of the appellant and under the elementary rules with reference to law of sales, there can be absolutely no question but that the title to this terra cotta at all times remained in the appellant. We submit, therefore, that any claim of lien for the unmanufactured or undelivered terra cotta at the works of the appellant near Spokane could not have been made in good faith and yet a reference to the lien filed will show that the appellant claimed its lien for the full contract price for this terra cotta allowing nothing for the unmanufactured and partially manufactured product, nothing for the loading of the material on cars in Spokane, nothing for the freight, and nothing for the delivery of the terra cotta from the railroad company in Tacoma to the building site.

The Supreme Court of Washington in common with most of the other courts of this country, has decided that a lien claimant who deliberately files a lien including therein non-lienable items thereby forfeits his right to foreclose for the lienable items. We think that the facts of this case clearly show that there could be no claim in good faith that the appellant was entitled to a lien on this building for the terra cotta which had not been yet fully manufactured, or for terra cotta which had not yet been put on cars in Spokane, and that it is equally clear that if the appellant did have a lien at all, it was only for the material which had actually been shipped to Tacoma, which was of the

value of $58,000.00, and upon which the appellant had been paid $20,000.00, so that the limit of the claim of the appellant was $38,000.00, whereas the lien filed by it was for $89,000.00.

As we view the matter the appellant in this case stands in exactly the same position that the appellants stood in the case of *Robinson vs. Brooks*, 31 Wn. 60, in which the Supreme Court of the State of Washington, says:

"The notice of lien sought to be foreclosed recites, in substance, that the appellants claim a lien for $110.00 for cutting 110 acres of wheat at the agreed price of $1.00 per acre. It also recites a breach of the contract by respondents, on account of which breach appellants sustained damages in the sum of $60.00 profits which appellants would have made had the contract been completed as agreed, and further damages in the sum of $60.00 by reason of appellants remaining idle for four days on account of said breach of contract and claim a lien for the sum of $230.00 less $24.50 paid thereon. The complaint prayed for the sum of $205.50, for foreclosure of the lien to satisfy the same and for the further sum of $100.00 attorney's fees and $10.00 cost for preparing and filing the lien * * *"

"If the appellants had a right to a lien on the grain in question, the amount of the lien was for $110.00, less the payment of $24.50, or $85.50.

Instead of filing a lien for that amount they filed a lien for $205.50, $120.00 of which was for items clearly not lienable under our statute. Appellants never supposed and they do not now claim that these items are lienable or inserted by mistake or inadvertance. They were wilfully inserted in the notice of lien, and a claim made therefor. It is manifest from the record that the claimants inflated their real claim for $85.50 to $205.50 and sued to foreclose the same for the full amount, besides $100.00 attorney's fees. The evidences of bad faith are so clear that the whole claim should fail."

We do not think the appellant has or ever had any lien claim, but if it did have one, the only item thereof which is even debatable is the item for the terra cotta which had been shipped to Tacoma and which the appellant's evidence shows to be worth $58,000.00, and upon which it had been paid $20,000.00. Instead of filing a lien for this $38,000.00, concerning which there might be a question, however, the appellant filed its lien for $89,000.00 (Ex. D. Tr. p. 280 et seq). This was not done inadvertently as is shown by the fact that the lien was filed on February 24, 1921, more than a month after the institution of this action. And in an attempt to stretch the allegations of its complaint to meet the statements of its lien claim as filed, the appellant did exactly what the appellants in the Robinson case did, that is, it alleged that it lost

profits to the extent of $5,000.00 (Par. 16-Tr. p. 226) and then asked the Court to foreclose this preposterous lien in the sum of $84,000.00 and to give it an attorney's fee of $10,000.00. (Tr. p. 229.) So that even adding the $5,000.00 to its lien claim as set forth in the allegations of this cross-complaint, those allegations fall $5,000.00 short of the amount claimed in its lien claim.

Upon the authority of the Robinson case this appellant should have been dismissed from this action for want of equity. The court, however, did not do this, but merely held that the terra cotta shipped to Tacoma by the appellant was so shipped for its own convenience, that there had been no delivery thereof and that the appellant had never parted with title to any of the terra cotta manufactured by it. It seems to us that this is a controlling feature of this case. In its brief the appellant cites many cases to the effect that it is unnecessary that material be actually used in the construction of a building, but that a lien claimant who has *delivered* material for use in a building may have a lien therefor. It seems to us, however, that it would be stretching the English language far beyond the breaking point for a court to hold that by the words "furnish for use in the construction" the Legislature meant to enact a law which would give a man a lien for material which he had never delivered to anyone except his own agent and to which he has title under the contract

of sale. Under the evidence in this case, this is the position of the appellant Washington Brick Lime & Sewer Pipe Company. It is true that it had shipped a portion of this terra cotta from its yards in Spokane to Tacoma, but this material was not consigned to the building company, but was consigned to a transfer company who were in the employ of the seller, and after arriving in Tacoma this portion of the terra cotta was stored on property rented by the seller. The Court will bear in mind that the written evidence here very clearly shows that the building company was ready to accept the delivery of the terra cotta manufactured by the appellant at least as early as November, for at that time letters were written to the appellant in which its attention was called to the fact that the terra cotta which it had delivered in Tacoma was not such as would give the building company anything to start on, and urging that the terra cotta for the lower floors be shipped, and it is significant that the appellant replied to that letter in substance stating that it would not ship the terra cotta manufactured and at its yards except under one of two conditions, namely, that it be paid 75% of the contract price of the material shipped, or that the material be delivered to the building site. This indicates very clearly that the appellant even at that time had in mind the possibility of filing this lien and recognized that unless there was a delivery at the building site that no lien would lie. The appellant's subsequent conduct further streng-

thens this view. As soon as it was advised of the failure of the bank it caused its terra cotta, then loaded on the cars, to be unloaded and placed in its yards. Thereafter and after the appointment of the receiver, when the receiver was thinking of attempting to place the terra cotta on the building to protect the steel, which was even after the appellant had filed its lien and was seeking foreclosure thereof in this action, the appellant refused to permit the use of the terra cotta, and refused to answer a letter directed to it requiring it to elect whether or not it would take the terra cotta and abandon its lien, or deliver the terra cotta and rely on its lien.

Certainly under these circumstances no one could say that the appellant "furnished" any material. The Washington Supreme Court has with certainty announced the rule that there must be a *delivery* of the material. A comparison of the cases of *Western Hardware & Metal Company vs. Maryland Casualty Company,* 105 Wn. 54, 177 Pac. 703, and *Holly-Mason Hardware Co. vs. National Surety Company,* 107 Wn. 74, 180 Pac. 901, clearly shows this. The opinion in the Western Hardware case was written a considerable length of time before the opinion in the Holly-Mason case. The Court will notice that Judge Fullerton who wrote the opinion in the Holly-Mason case was one of the Department Judges who concurred in the opinion in the Western Hardware case. So that

there can be no question but what our Supreme Court meant both these cases to stand as declaratory of our law.

Since these two cases are relied upon by all of the parties to this appeal, we believe that a discussion of them will materially assist the Court, particularly in view of the fact that, as we read them, they do declare the whole law of Washington on the question involved in this appeal.

In the Western Hardware Company case the the contractors contracted to furnish the material for, and install, a heating and ventilating plant in a school house. Under the law, they furnished a bond, with the defendant as surety, by the express terms of which they agreed to pay all persons who should supply subcontractors with supplies for carrying on the work. The contractors sublet the furnishing and installing of the sheet metal work of the heating plant to a subcontractor who conducted a sheet metal shop wherein he pressed and worked sheet metal into the form required for his jobs. The subcontractor bought on credit and accepted delivery from the claimant, of sufficient sheet metal in bulk to fulfill his subcontract under an express agreement that he would use it in the performance of his sub-contract. The claimant thereupon advised the contractors of this and notified them that it would hold them and their bondsman for payment. The sheet metal was delivered to the shop of the subcontractor rather than

at the building in order that he might form it for use in the construction of the heating plant, where he had proper tools and appliances for that work, and the contractors knew that the subcontractor contemplated pressing and shaping the material at the shop and he had their consent thereto. Only a portion of the metal was actually used for the purpose for which it was furnished, and the balance was probably disposed of by the subcontractor elsewhere. The question was whether the claimant could hold the bond for the whole bill or only for that portion which was actually used. The Supreme Court held that the claimant could hold the bond for the whole bill.

In the first place the Court will notice that this whole bill fell squarely within the express terms of the bond, which was an agreement to pay "all persons who shall supply * * * subcontractors with * * * supplies for the carrying on of such work". The decison of the Court was therefore right, no matter how it reasoned to arrive at that conclusion. In reasoning the case the Court notes that it had theretofore recognized the analogy between lien statutes and bonding statutes and particularly mentions that the lien statute by its terms makes the sub-contractor the agent of the owner, and calls attention to the fact that the bonding statute is broader in its terms than the lien statute.

The question presented to the Court in that case, and the question to which the Court directed

its argument was whether the claimant who had furnished material which was not actually used in the building could have a lien therefor and the question of the place where the delivery was made was entirely secondary. This is shown by the fact that the Court cites *Hutling Bros. vs. Denny Hotel Company*, 32 Pac. 1073, as controlling, and that it was contended that that case had been overruled by later decisions. In fact the Denny Hotel case is direct authority against the appellants contentions in this case. One of the material questions in the Denny Hotel case was whether or not the lien was prior to a mortgage covering the premises, which depended upon the question as to when the lien attached, and the Court says therein:

"It (the lien claimant) was to furnish the materials delivered at the building in the city of Seattle, *and it cannot be held to have attached before the delivery thereof.*"

The Court then proceeds to state that the appellant relied on the decisions in *Puget Sound Bank vs. Galluci*, 82 Wash. 144; *Lipscomb vs. Exchange Bank*, 80 Wn. 296, and *State Bank vs. Ruthe*, 90 Wash. 636, as overruling the Denny Hotel case, and shows that they do not overrule the Denny Hotel case.

The Court then quotes from the Pennsylvania cases, italicising words which we believe express the rule:

"But it is said, that there is a distinction between materials delivered *at or near* the building, or at a distance from it; but I cannot see it, provided the delivery *at a distance* was in the *usual course of business*, as it was in this case. It is customary to prepare part of the carpenter's work at the shop; why then should the boards be thrown down first at the building, in order to be taken up again and carried to the shop? The delivery at one place or another, is no further important, than that it furnishes evidence of the purpose for which the materials were sold."

And in quoting from the case of *Berger vs. Turnblad*, 107 N. W. 543, the Court says:

"The case of *Howes vs. Reliance Wire Works Co., supra*, (46 Minn. 44, 48 N. W. 448), however, establishes an exception to this rule, which is to the effect that where the material required for the erection of a building is specially prepared for it at the shop of the contractor with the consent of the owner, the material is deemed to have been furnished on the premises. The exception ought not to be extended to cases not fairly within the principle upon which it rests, otherwise the door will be opened for fraud or collusion between the contractor and the mechanic or materialman."

We believe the Holly-Mason case but emphasises the true rule to be that in order that the claimant may have a lien where material required

for the erection of a building is *sold and delivered* to the shop of a contractor (or subcontractor) with the consent of the owner. *"The material is deemed to have been furnished on the premises."* In such case the materialman surrenders the possession of the material and ordinarily loses title thereto, he therefore does "furnish" material "for use in the construction" of the building and since the contractor and subcontractor are made the *agents of the owner* by the express terms of our lien statute the possession of the material thereby constructively is in the owner, and he has the legal title thereto.

When, however, the facts are such that the delivery of the materials to the contractor or subcontractor cannot be said to give the owner constructive possession thereof or to pass title to him and are not such that the material can be *"deemed to have been furnished on the premises,"* the lien fails. In that case it is said:

"The further contention is that the evidence was insufficient to justify the judgment; the more precise objection being that it was neither shown that the materials sold the contractor upon which the claim is founded, were actually used in the construction of the building, nor delivered on the ground for use therein. The testimony as to the delivery of the materials was in substance this: The place of business of the respondent was in the city of Spokane, some distance from the place where

the buildings were being constructed. The goods were ordered by the contractor in varying quantities and at different times during the progress of the work. As the orders were received, the respondent delivered the materials ordered to a common carrier, sometimes a railroad company and sometiemes an express company, for transportation to the shipping station nearest the site of the building, some two and one-half miles therefrom, from which place they were receipted for to the carrier by the contractor or someone in its behalf. The actual receivers of the goods were usually draymen or their employees, and the respondent was unable to show that more than a small quantity of them actually reached the building. The question, therefore, is whether this is such a delivery as will charge the bondsman of the contractor." * * *

"It will be observed that the statute does not in terms make use in the building a necessary prerequisite to a right of recovery on the bond for materials furnished, nor does it make delivery on the ground such a necessary prerequisite. This court has held, however, in constructing a statute with similar provisions of which the present statute is but amendatory, that one or the other of such conditions must be shown before a recovery can be had. In *Gate City Lumber Company vs. Montesano,* 60 Wash. 586, 111 Pac. 799, this language was used:

" 'The question then arises, who is a material-

man, and what is a just debt incurred in the performance of contract work, within the meaning of the act of 1909. In the case of *Fuller & Co. vs. Ryan*, 44 Wash. 385, 87 Pac. 485, we held that a materialman could not claim a lien for material which was neither used in the building nor delivered on the ground for use therein. See, also *Foster vs. Dohle*, 17 Neb. 631, 24 N. W. 208; *Weir vs. Barnes*, 38 Neb. 875, 57 N. W. 750. We are not disposed to place a broader construction on the term materialman, and just debts incurred in the performance of contract work, under this statute. A more liberal construction would permit of the grossest frauds on the part of contractors, and is not necessary for the protection of bona fide materialmen. It appears from the testimony in this case that at least three different lumber concerns furnished material to be used in this roadway, and if a materialman brings himself within the terms of the statute by simply loading lumber on the cars at a distant point and billing it to the contractor without more, it can readily be seen that the contractor can mulct the city, or the sureties in case a bond is given, for the value of material many times in excess of the requirements of his contract.'

"The distinguished judge writing the opinion quoted, in support of the conclusion reached, the following from the case of *Foster vs. Dohle*, 17 Neb. 631, 24 N. W. 208:

" 'But it will not be seriously contended that the mere fact that the owner enters into a contract with a builder to erect or repair a building authorizes the builder to go to every lumber yard in the city and every hardware store and purchase from each a sufficient quantity of material for the erection or repair of the building in question, and make the owner of the building liable therefor. If all this material was delivered by the materialmen at the building, and they acted in entire good faith, it is possible the owner might be liable, because the delivery of the material would be notice to him of the unusual quantity which was being furnished for which he might be liable. But that question is not before the court. The contractor, however, unless expressly constituted such, is not the agent of the builder, and cannot bind him by contracts for materials not put into the building or delivered at the same for use therein. As there is nothing to show that any of the material not allowed by the court below was delivered at or used in the building the owner thereof is not liable for the same.'

"The principle of this case seems to us now eminently just. The bondsman manifestly did not become surety for all the materials the contractor might purchase during the time he is actually at work upon the contract, regardless of the use made of the materials. But since he may not be able to show that the materials furnished actually went

into the structure, he is allowed the more liberal rule of showing that he delivered the material on the ground for use therein. This rule, as was said in the case cited, is sufficient for the protection of bona fide materialmen, while a more liberal rule might lead to the grossest of frauds.

"The principle announced will bar a recovery in the present case, save for such material as was actually delivered at the building. While it is clear from the evidence that some part of it was so delivered, we have found it difficult to segregate the proportion delivered from the remainder of the claim. The necessity for making such a segregation did not arise in the court below, owing to the view the trial court took of the governing principles of law, and this accounts, perhaps, for the obscurity of the evidence in this respect.

"We have concluded, therefore, to direct a reversal and a remand of the cause(with instructions to ascertain what proportion of the materials sold the contractor were actually used in the construction of the building or were actually delivered on the ground for use therein. Either party at the hearing will have the privilege of introducing further evidence."

A consideration of these cases therefore leads to the conclusion that the Washington Court has gone only to the extent of holding that there may be constructive delivery to the premises and that

when material is *sold and delivered* to the shop of a contractor or sub-contractor, for the purpose of there working it into condition to be placed in the building, with the knowledge, consent and approval of the owner or contractor, there is a constructive delivery to the building site, but there must be a *sale and either an actual or constructive delivery* to the building site.

Since the construction put upon the lien statute by the Washington Supreme Court is the construction which will be adopted by this Court, a citation of authorities from other jurisdictions would seem to be beside the point, in view of the fact that our Supreme Court has emphatically stated time and time again that there must be at least a delivery at the building site. We will quote briefly from a few of these decisions:

In *Fuller & Company vs. Ryan*, 87 Pac. 485, the Court says:

"It was urged by appellant that the principal error of the trial court was its holding to the effect that a materialman's lien could not be established where it did not appear that the materials were actually used in constructing the building, or delivered on the premises for such use. Appellant, through its counsel, expressed itself as willing to base its rights to a reversal of the decree on this proposition. We think the holding of the trial court upon this question must be upheld."

* * *

"If the materials were not used in the building, nor taken to the premises, we do not think it could be said that they were purchased to be used in such building, within the meaning of the statute. The reason for allowing a lien to secure the purchase price of building material would seem to be absent where such material was neither used in the building nor taken to the premises for the purpose; and it would be difficult to see why the vendor of such material would have any better right to a lien than would the seller of any other species of personal property. Doubtless, the actuating thought of the legislature was that the materialman should retain a purchase-price lien upon the thing itself; and this could be accomplished only by allowing a lien upon the building and the premises into which, or upon which, said material should become builded or delivered. To hold the right of lien further extended could only be done under a statute clearly evidencing such an intention on the part of the legislature. We deem our statute incapable of such a construction. (Citing Cases.)

In *Crane Company vs. Fernandis*, 90 Pac. 1134, the Court says:

"We are unable to find any competent testimony tending to show that the material was furnished for use in the building or was so used * * * there must be some testimony tending to show the furnishing and the use of the material for which the lien is claimed."

In *Tsutakawa vs. Kumamoto*, 101 Pac. 869, the Court says:

"The object of this statute is to secure a lien to the labor and materialman for that which goes into the finished structure."

In *Gate City Lumber Co. vs. Montesano*, 111 Pac. 799, the Court says:

"In the case of *Fuller & Co. vs. Ryan*, 87 Pac. 485, we held that a materialman could not claim a lien for material which was neither used in the building nor delivered on the ground for use therein, (citing cases). We are not disposed to place a broader construction upon the term *materialman*, and *just debts incurred in the performance of the contract work*, under the statute. A more liberal construction would permit of the grossest frauds on the part of contractors, and is not necessary for the protection of bona fide materialmen."

Unless it was the intention of our Supreme Court to overrule all of these cases in the Western Hardware case, this is still the law of Washington. We believe that no one will even contend that the Supreme Court had any such intention, and that this court must conclude that the only thing decided in that case was that when the circumstances warrant it, a delivery of material to a place other than at the building site may be "deemed to have been furnished on the premises".

In none of the cases presented by these appeals were the circumstances such that the "materials could be deemed to have been furnished on the premises" because they were not furnished to anyone at any place, but on the contrary the title to them and the possession of them have always remained in the contractors.

A reading of the cases from other jurisdictions has convinced us that there is probably a distinction underlying many apparently conflicting decisions of the courts, in this: if a laborer performs labor on articles for use in a building at a point distant from the building which place can be fairly and reasonably construed to be the place agreed upon for the doing of the work that constructively the work is done upon the building and the lien is upheld. This would seem to be entirely reasonable and just. Where, however, a materialman still has his material in his possession, it would be unreasonable to allow him a lien for the material, although it might be entirely reasonable under the same circumstances to allow his laborers to claim a lien for their work thereon. In such case, both the laborer and the owner can be protected. If the laborer should compel the owner to pay him by the foreclosure of his lien, the owner thereby becomes subrogated to the laborer's rights as against the material and can force the materialman to either repay the money or can foreclose on the materials themselves. That was substantially the situation in

the case of *Berger vs. Turnblad*, 107 N. W. 534, cited with approval by the Washington Supreme Court in the Western Hardware & Metal Company case.

This idea is very forcibly illustrated by the case of *Trammel vs. Mount*, 4. S. W. 377, referred to in appellant's brief. In that case a materialman had agreed to build a stone wall for a house. He cut and actually used in building that portion of the wall which was built of certain stones, and at the time the work was stopped he had certain other stone cut at his shop. The question involved in the case was whether or not he was entitled to a lien *for his labor* on the stone which was cut at his shop. It will be noted that he did not claim a lien for this material, but only for his labor in preparing it. In that case the court says that it approves the so-called Pennsylvania rule and reasons, as follows: "We have heretofore held that a delivery to the owner no matter at what distance from the building, transfers the title to the material * * *. It gives the owner of the building complete ownership and control over it and it would be unjust to place it in the power of the person to whom it was delivered or furnished to defeat a lien upon his property through his own wrong in appropriating it to other purposes than those for which it had been furnished."

Again in the case of *Burns vs. Sewell*, 44 N. W. 234, cited by appellant, the court said: "the

furnishing of material is complete *when it is sold and delivered* for the purpose of the erection."

Again 2 Jones, 3rd Sec. 1329, referred to by the appellant in its brief says: "as soon as the materials are furnished they become the property of the owner and subject to the lien; and they are not liable to be taken for the debts of the contractor or materialman who furnished them.

Again in *Thompson-McDonald Lbr. Co. vs. Morawitz*, 149 N. W. 300, the court says: "in many instances material for the construction of buildings is shipped to the contractor at some distant point. A delivery to the carrier in such a case, *the material being consigned to the contractor*, is a delivery to the contractor * * *"

Again in the case of *Great Western Mfg. Co. vs. Hunter*, 16 N. W., 759, cited by appellant, the Court says: "If the contract and delivery, or furnishing under it, *is sufficient to create an indebtedness or liability*, it is sufficient to create a lien."

In *King vs. Cleveland Ship Co.*, 34 N. E. 436, cited by appellant, the Court says, with reference to a contract which required the materialman to furnish an engine "f.o.b cars Cleveland": "when that was done the contract was fully performed on the part of the furnace company and defendant in error. The title to the engine at once vested in the purchasing company, which then became bound for the payment of the whole purchase price as stipu-

lated in the contract * * * when the delivery on the cars was complete the engine was furnished in compliance with the contract, and within the meaning of the statute."

We believe that from these quotations that it will at once become apparent that no court has intended to lay down the law that a materialman who has never parted with either the title or possession of the material is entitled to a lien.

Certainly the appellant in this case made no delivery. It specifically and in writing refused to even ship its terra cotta to Tacoma "until we get payment for same or until you are ready to receive it at the building we will not ship—until either one of these propositions are completed." (Tr. p. 813.) And when it received notice that the bank had failed it unloaded the terra cotta which it had on cars ready for shipment to Tacoma and after the institution of this action when the Receiver demanded of it that it either deliver the terra cotta and rely on its lien, it refused to answer the letter.

We realize that when a person makes a contract and in good faith expends his money in preparing to fulfill the terms thereof and the contract is breached, a hard case arises. But that is the risk that is incident to practically every contract and there is no reason in giving the contractor other and different remedies than those given to

every one who has contracted to sell personal property when the buyer breaches the contract before the goods are delivered. This is the case with the appellant. It contracted to sell and deliver personal property but before there was any delivery the contract was breached. That does not make it a materialman within the meaning of the lien statute which was designed to protect an unpaid vendor and not to furnish a different relief for damages for breach of contract.

Respectfully submitted,

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